UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE

OCEAN BUFFET, LLC

and Case: 22-CA-30034

318 RESTAURANT WORKERS UNION

Bert Dice-Goldberg, Esq. of Newark, New Jersey for the General Counsel.
Stacy Van Malden, Esq. (Goldberger and Dublin PC) and He Yong Chen, president and co-owner for the Respondent.[1]

DECISION

Statement of the Case

STEVEN FISH, Administrative Law Judge: Pursuant to charges filed by 318 Restaurant Workers Union (Union) on June 22, 2011, the Director for Region 22 issued a complaint on October 21, 2011, alleging that Ocean Buffet (Respondent) violated Sections 8(a)(1), (3) and (5) of the Act.

The compliant alleges in substance that Respondent refused to consider for hire and refused to hire 10 members of the Union because of their union and concerted activities in violation of Section 8(a)(3) of the Act and that it refused to recognize and bargain with the Union, which was the recognized collective bargaining agent of the waitstaff employed by Respondent's predecessor, Century Buffet (Century) in violation of Section 8(a)(1) and (5) of the Act.

The trial was conducted before me in Newark, New Jersey on November 22, December 1 and 19, 2011. Briefs have been filed by General Counsel and by Respondent and have been carefully considered. Based upon the entire record, including my observation of the demeanor of the witnesses, I make the following:

Findings of Fact

[1] Respondent's attorney filed an answer and appeared and represented Respondent on the first day of the trial, November 22, 2011. At the start of the second scheduled day of trial, December 1, 2011, Respondent's attorney sought permission to withdraw from representing Respondent since Respondent had terminated their agreement. General Counsel did not oppose this request, which I granted. Respondent agreed to continue the trial with He Yong Chen (its president and owner) as its representative. Respondent was granted a postponement on December 1, 2011 (after General Counsel rested its case) to read the transcript and give it time to prepare its defense.

I. Jurisdiction and Labor Organization

Respondent began operating a buffet-style Chinese restaurant in Clifton, New Jersey, herein called the Clifton facility, on January 1, 2011.

Based on a projection of its operations since January 1, 2011, Respondent will annually derive gross revenues in excess of $500,000. During the same period of time, Respondent purchased at its Clifton, New Jersey facility goods and materials valued in excess of $5,000 directly from suppliers located outside the State of New Jersey.

It is admitted, and I so find, that Respondent is and has been an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

It is also admitted, and I so find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. Prior Related Case

Century Restaurant and Buffet, Inc. d/b/a Best Century Buffet, Inc.,
358 NLRB #23 (March 27, 2012)

On March 27, 2012, the Board issued a Decision and Order, affirming in all essential respects a decision issued by Judge Steven Davis on May 2, 2011, finding that Century Restaurant and Buffet, Inc. d/b/a Best Century Buffet (Century Buffet) violated Sections 8(a)(1), (3) and (5) of the Act.

The decision included a number of factual and legal findings that are relevant to the instant case. Century Buffet and Restaurant, Inc. was owned by the wife of Yen Pang Yeung until she died in 2006. Her husband assumed the business and changed the name to Best Century Buffet. Yeung retired when he became the new owner, and he entrusted the operations of the restaurant to Steven Lam, who hired and fired employees, decided on staff issues and assigned work to employees.

In August of 2009, Ko Fung Yeung (Peter), the son of Yen Pang Yeung, became involved in the operation of the business, and in December of 2009, Best Century Buffet was dissolved and renamed Century Buffet Grill, Inc. On January 1, 2010, Peter became the sole owner of the entity to be referred to subsequently as Century Buffet. The new business retained the same furniture, equipment, dishes and silverware, for which Peter did not pay his father any compensation.

The waitstaff employees, who were employed in 2009 on the Best Century payroll, were Rong Chen (Rong), Li Xian Jiang (Jessica), Ming Xia Jiang, Rong Li (Lily) and Jin Ming Lin (Ivan).[2] The restaurant also employed 15 other employees working primarily in the kitchen.

Ivan, Jessica and Rong visited the union's offices in late 2008 and spoke to the union vice-president, Fong Chun Tsai (Tony). They had a number of grievances that they mentioned to Tony, including assignments of work, failure to pay a salary, Century Buffet deducting money from wages and tips, Manager Lam sharing in the tip pool and that the employees had to pay

[2] For ease in reading, these employees will be referred to as Ivan, Jessica, and Rong.

their own transportation to and from work. Tony told them that he would locate an attorney, who could help them. All three employees became members of the union at around that time.

On April 9, 2009, Rong, Jessica, Ivan and another individual, Jin Fang Lui, filed a federal lawsuit against Century Buffet, its owner Peter, and Steven Lam pursuant to the Fair Labor Standards Act and the New Jersey Wage and Hour Law. The suit alleges violations of minimum wage and overtime laws, "unlawful expropriation of tips" and breach of contract. On May 29, 2009, Rong, Ivan and Jessica handed Peter a copy of the lawsuit.

On June 1, 2009, the union filed a petition for an election with the Board, seeking an election in a unit of waitstaff employees. In early June of 2009, Tony received a call from Steven Wong, a community activist in Chinatown, who had been designated by Peter to help resolve the NLRB election and the federal lawsuit on June 10, 2009. Yeung issues a durable power of attorney to his son Peter to permit him to manage the restaurant and to negotiate with the union.

A meeting was arranged by Wong for June 10, 2009 between Tony and Peter, in which Wong was present. At the meeting, which was held at Wong's office, present in addition to Tony was another union representative as well as Ivan and Rong. Peter explained that he had a power of attorney from his father to that day and the business was being transferred to him and that he was authorized to operate the business and negotiate with the union.

Tony and Wong explained to Peter what the union was about and that the union wanted Century Buffet to recognize it as the representative of its waitstaff employees and bargain with it about the workers' conditions. In that regard, Tony presented Peter with a recognition agreement and asked him to sign it. Tony asked Peter if Century Buffet was willing to voluntarily recognize the union, and Peter said that he was. Wong asked Peter if he understands what he was signing, and he said that he understands. Peter looked at the agreement and signed.

The agreement reads as follows:

> Best Century Buffet Inc. (formerly d/b/a Century Buffet & Restaurant) hereby recognizes 318 Restaurant Workers Union as the exclusive representative for the purposes of collective bargaining for the employees in the following appropriate unit:
>
> All the full time and regular part-time wait-staffs employed by the Best Central Buffet Inc. which locates at 166 Main Avenue, Clifton, New Jersey. And excluding guards, professionals, and supervisors as defined in the National Labor Relations Act, as amended.
>
> Both parties agree the appropriate unit has 5 wait-staffs. The undersigned employer and the Third Party checked the union authorization cards which showed that union has 3 out 5 wait-staffs currently work in the restaurant signed the union authorization cards.

Tony informed Peter that he would withdraw the Labor Board petition once the recognition agreement was signed. In fact, the union did withdraw the petition at the Labor Board the next day.

After the recognition agreement was signed, Peter and Tony discussed various terms of employment of the employees, such as reimbursement of employees for transportation, wages, portions of employee tips on credit cards deducted by Century Buffet, Manager Lam taking a

share of tips and employees performing “side work” without pay. Some agreements were reached on a few issues and others were left for further discussion.

The parties then discussed settling the federal lawsuit, but Peter stated that Century Buffet could not afford the sum of money demanded by the plaintiffs.[3]

On July 22, 2009, Wong arranged another meeting with Tony and Peter. They discussed the lawsuit, and Tony stated that the employees sought $800,000, but the employees would consider lowering the demands if Century Buffet improved working conditions. Tony again asked Peter why Lam, a manager, was still taking a share of the tips and demanded that Peter order Lam to cease doing so. Peter replied that Lam was a waiter and not a manager, and therefore, entitled to share in tips. Peter did state, however, that he would speak to Lam and advise the union.

Peter and Tony also discussed transportation costs and wages, and Peter agreed to Tony's suggestion to pay employees $2.13 per hour as regular rate and $3.20 per hour for overtime and told Tony that these wages would start in August.

A few days after this meeting, Tony was informed by the employees that Lam was still taking a share of tips from employees and that Peter did not reimburse them for transportation expenses. Tony then called Wong and asked him to check with Peter on these issues. Shortly, thereafter, Wong called Tony and said that he could not contact Peter and that he no longer represented Century Buffet.

In the context of the above events, Century Buffet in August made several changes in the terms and conditions of employment of its employees. The judge found, and the Board affirmed, that these changes were unlawfully motivated by the employees protected conduct in the lawsuit and supporting the union. These changes were: (1) requiring employees to pay for meals (contrary to past practice); (2) elimination of employee transportation benefits; (3) reduction of employees’ work hours; and (4) requiring employees to sign in and out of work.

The decision also found that Century Buffet discharged Jessica by refusing to allow her to return to work after her two-week approved leave of absence because of her union membership and her participation in the lawsuit in violation of Section 8(a)(1) and (3) of the Act.

The decision also found that Century Buffet violated Section 8(a)(1) and (5) of the Act by unilaterally making the above mentioned changes in working conditions (requiring employees to pay for meals, elimination of transportation benefits, reduction in hours and imposition of sign in and out requirements without notifying and bargaining with the union.

In making this finding the decision concluded that Century Buffet had voluntarily recognized the union in an appropriate unit of waitstaff employees based on a recognition agreement, wherein it was conceded that the union had authorizations cards for 3 of 5 unit members at the time of recognition. Therefore, since the union was the statutory representative of its employees, Century Buffet was not free to make these changes absent notification to and bargaining with the union.

[3] While Peter had testified that he agreed to sign the recognition agreement on the expressed promise of the union to withdraw the lawsuit, this testimony was rejected by the judge and not credited.

The decision ordered Century Buffet to reinstate Jessica to her former job as well as pay backpay and to rescind the unilateral changes that it instituted.

Finally, it is notable that Jessica, Ivan and Rong all testified as witnesses at the trial of this case, which was held on August 3 and 4, November 18 and December 9, 2010.

III. Facts

As I related above, the Board in *Century Buffet*, supra found in its decision that Century Buffet unlawfully terminated the employment of Jessica by failing to permit her to return from her authorized two-week leave of absence on September 17, 2009.

The union, thereafter, filed charges alleging this conduct to be unlawful, resulting in the issuance of a complaint by the Region on May 24, 2010, supporting the allegations of the charge with respect to this allegation as well as other allegations set forth above.

Starting in March of 2010, the union began a campaign of picketing and handing out leaflets to customers to protest the unfair practices committed by Century Buffet. The picketing would occur in front of the restaurant about once or twice a week and would last from one to two hours a day. All of the discriminatees participated in this conduct, which lasted until Century Buffet closed on December 12, 2010, as will be detailed more fully below. Thus, the picketers included Jessica, Ivan, Rong and Zha Xia Liu (Amy), who were all employees of Century Buffet as well as the other six discriminatees, who were union members and also participated in picketing.[4] The picketers held signs, protesting the unfair labor practices of Century Buffet and unfair treatment by Century Buffet towards its workers. The assertions made on the signs included forcing workers to work 72 hours a week, not paying any wages, deducting 16% from credit card tips and forcing them to pay for runaway checks. The signs mentioned the lawsuit by the workers in federal court and asserted that Century Buffet retaliated against employees for filing the lawsuit and supporting the union. The signs also made specific reference to discharge of Jessica, asserting that she "took time off after getting a miscarriage from being overworked, and the employer refused to let her come back to work."

On December 11, 2010, Peter (Century Buffet's owner) informed employees that the next day, December 12, would be the last day Century Buffet would be opened. Peter did not say anything to the employees about what was going to happen to the restaurant or to the employees. Prior to that day, Peter had mentioned to Ivan that he was going to sell his restaurant. After finding out this news and discussing it with Jerry Weng, a union organizer, it was decided that employees would return to the restaurant to picket and notify any buyer of the restaurant that Century Buffet was involved in a labor dispute. Accordingly, on December 13, Weng, Ivan, Rong, Jessica and two other union members went to the restaurant and picketed and put up notices. They went to picket every other day during which they picketed for about an hour and a half. They also passed out pamphlets to customers, who were passing by. The restaurant was closed although Peter was inside the restaurant during these days. The restaurant had posted a sign reading "Sorry, we are close." The employees and Weng posted their own signs next to this notice as well as on various doors to the restaurant. The notice reads in English, "Century Buffet Restaurant violate the Nationals Labor Relations Act" [sic] Case 22-CA-29242. The notice then reads Century Buffet in English followed by Chinese words translated as "violates National Labor Relations law and workers are picketing and protesting."

[4] These individuals were Yia Yun Guo (Guo), Mei Fang He (He), Hui Lin (Hui), Yu Jia Lin (Yu), Jian Zhing Luo (Luo) and Mei Yang (Yang).

Each day that the workers would return to picket the signs that they posted were removed. They would repost the signs and picket and distribute for an hour and a half each time. This procedure continued as noted on an every other day basis.

On December 21,[5] Ivan, Rong and three other union members went back to the restaurant to picket and to repost the above described notices. After reposting the notices, since as usual the prior notices had been removed, Ivan noticed that a light was on inside the restaurant. The employees walked over closer to the restaurant and saw He Chen[6] inside the restaurant appearing to be cleaning. When Chen saw the employees looking at him, he tried to hide from them.

The employees then resumed their picketing. They noticed Chen watching them picket through the window during their picketing on that day.

On December 26, when the union members arrived as usual to picket, they saw a sign for Ocean Buffet and a "Grand Opening" sign posted at the restaurant. The sign did not have a date on it. Ivan, Rong, Jessica, Amy and Yia Yun Gao went inside the restaurant to apply for a job.[7] As they entered the vestibule, they were approached by the hostess-cashier, who later identified herself as Ms. Chen. Ivan and Rong had been taking pictures before they entered the premises. Ms. Chen asked the employees what they were doing there. Ivan responded that the employees were from Local 318 Union and were there to look for jobs. Ms. Chen replied that she knew that they were the people, who picketed outside, and inquired if the employees were there to look for a job why did they take a picture. Ivan replied that he was just taking a picture, that's all. Ms. Chen responded that if he wanted to take pictures, he had to get permission and it was against the law and that she could sue him in court.

Ivan asked if there was an application form that the employee should fill out to apply for a job. Ms. Chen replied that there is no application form and that right now "we don't need anyone." Ms. Chen then asked the five employees to write down their name, address and phone numbers on a yellow pad, which she handed to the five employees. Each of them filled out the information on the pad as requested and returned it to Ms. Chen. [8] Ivan asked if the boss is inside. Ms. Chen asked the employees to wait. An individual came out and identified himself as the manager.[9]

Xu asked the employees what they wanted. Ivan replied that they were Local 318 Union members and came to look for jobs. Xu then asked the employees "didn't you file suit against the boss here. Didn't he give you unemployment benefits?"[10] Ivan responded that the

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[5] Weng was not present on that day.

[6] Although Ivan and Fong did not know who Chen was on December 21, they met him later on, as described below, and identified him at trial as the person that they saw at the restaurant on December 21, 2010.

[7] As noted above, Ivan, Rong, Jessica and Amy were former employees of Century Buffet. Guo was a union member, who had participated in picketing at Century Buffet prior to the closing, but had never been employed by Century Buffet.

[8] During the course of their conversation, Ivan told Ms. Chen that the previous owner had closed the door and didn't notify the employees. Ms. Chen replied that the previous owner closed, "so we took over."

[9] Chen later identified the manager as Xiao Xu (Xu).

[10] I hereby correct the transcript, pursuant to the unopposed motion by General Counsel as

Continued

employees were just there to look for jobs. Chen commented that if there are any openings, he would call the employees.

Chen then came out and spoke to the group. Chen asked what the employees were doing there. Ivan replied that the workers were 318 union workers and were looking for jobs. Ivan added that "we worked in that restaurant before." Chen responded that he knew that and that he had seen the employees picketing outside the restaurant a few days before. Chen added that he had arranged for the hiring of his waitstaff before the restaurant opened and that he would wait until Respondent needed more help and see if anyone else would be hired.

On that day, December 26, according to Rong and Ivan, they noticed six waitstaff employees in the restaurant. Ivan took pictures of three of these individuals.[11]

Over the next few days, Ivan recruited additional Local 318 members, who had participated in demonstrations before at Century Buffet, to go to the Respondent and apply for work. As a result of that effort, Maoi Yang, Fang He, Yu Jia Lin, Hui Lin and Jian Zhing Luo went to the restaurant on December 29. Jian Zhing Luo spoke on behalf of the group and asked to speak to the manager. The manager (Xu) came out. Luo stated that they were from Local 318 union and asked for work as waiting persons. Xu replied that a few days ago people from Local 318 came to ask for jobs and that Respondent did not need anyone for now. Xu asked the five employees to write down their name, phone number and address on a pad, which he gave them. All the employees complied with their request and returned the pad to Xu. The employees then spoke to Chen. He said to them, "Oh, you are from 318, we are not hiring."

After December 26, the Union stopped picketing for about a week and a half. On January 13, 2011, six or seven picketers, including Ivan, Jessica, Amy and Rong returned to the restaurant and resumed picketing. Xu came outside and addressed the picketers. Xu said, "You union workers, you made previous restaurant close and now you are still making trouble here." Chen then came outside. Xu then told the workers, "This thing has nothing to do with the new employer here. Just move along." They went back inside.

A few minutes later, the employees were still picketing, and Chen came outside.

Chen asked the workers what they were doing. Ivan replied that they were picketing. Chen replied that "what you are doing here is illegal. Don't try to make trouble here. You have to go find your previous employer." Chen then pointed his finger at the union members and said, "You union workers always make trouble" and added that if they continue to make trouble at the restaurant, he would call the police.

The union members continued to picket at Respondent's premises twice a week since January 18, 2011. They passed out leaflets and signs. When customers came to the restaurant, some would walk over to the picketers to see what was going on. The union members gave them leaflets. The workers were on the public sidewalk, three parking spaces away from the front door and did not prevent any customers from going or coming out of the restaurant.

The picket signs carried by the workers reads, "Don't discriminate against union workers here [sic] them now" and "Ocean Buffet reinstate the union workers." The leaflet that the

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follows: p. 173, l. 125 "screw" should be "sue."

[11] One of these three waitstaff employees in the photographs taken by Ivan was later identified by Chen as Chen's son.

employees handed out to customers reads as follows:

STOP THE RETALIATION and
REINSTATE THE UNION WORKERS

BOYCOTT OCEAN BUFFET/ CENTURY BUFFET

Since May 2009, workers filed a lawsuit in federal court against Century Buffet Restaurant to demand the employer pay back their wages and tips stolen from them. Their employers did not pay them a single cent in wages.

The labor law violation was clear, but the employer refused to right their wrongs and retaliated against the workers by cutting their work hours and firing some of the workers who stood up for their rights and organized to join an union.

On May 24, 2010 the National Labor Relations Board, a federal government agency, issued a complaint against Century Buffet restaurant for unfair labor practices.

On December 12, 2010, two days after the National Labor Relations Board indicated to the employer that they plan to seek an order of injunction to force employer to reinstate the worker who got discharged, the employer closed down the restaurant and reopened two weeks later under the name of Ocean Buffet. Ocean Buffet and Century Buffet are essentially the same.

We urge you not to patronize the Ocean Buffet/Century Buffet and honor the picket line that fights against the employer's unfair labor practices.

Stand with us to demand that Ocean Buffet/Century Buffet:

1) Reinstate the workers illegally fired.
2) Stop the discrimination and retaliation against the union workers.
3) Pay back the workers their backwages and lost pay.

For more information, please contact Justice Will Be Served! at
(212)334-2333
www.justicewillbeserved.org

Justice Will Be Served! (JWBS) is a campaign that unites restaurant, hotel, deli, and other service workers in different communities across New York to fight against long hours, second-class wages, stolen tips and other sweatshop conditions. JWBS! is composed of a coalition of organizations: 318 Restaurant Workers Union, Chinese Staff & Workers' Association, National Mobilization Against Sweatshops

On February 18, the union organizer Jerry Weng, union administrator group member Wai Hung Lam, Ivan and Rong went to the restaurant. They asked for the boss and spoke with Chen. Lam introduced himself as a representative of the Union and asked Respondent to negotiate with the Union on a contract with the Union on behalf of the workers. He asked Chen to rehire the union workers, who used to work there, as well as hiring the union members, who applied for jobs. Lam added that this restaurant is a union shop and that the restaurant is the same except for the change of name to Ocean Buffet, including the telephone number.

Chen responded that he didn't have any money to remodel the restaurant. Chen added that he didn't know that the restaurant had disputes before he took over and he had nothing to do with the previous restaurant. Ivan injected that the employees picketed the restaurant for a long time and that he must have seen the picketing before he took over. Chen replied that only when he heard from the delivery man that there was picketing at the restaurant.

Weng then stated that Respondent was discriminating against union workers, which is illegal, and that it should hire the union workers, who applied for jobs. Lam then continued that he hoped that Chen would give the Union's request to hire workers and to negotiate with the Union consideration. Lam gave Chen a business card and asked Chen to call and give an answer in two or three days.

Chen never called Lam back and made no response to the Union's requests. Lam called several more times thereafter and left messages for Chen to return his call, but Chen never returned the call or made any contact with the Union.

Subsequent to February 18, the Union members continued to demonstrate and picket twice a week. On several occasions, Ms. Chen came out to the picketers and chastised the picketers for their conduct. Ms. Chen said, "You guys, you union workers don't stay here establishing yourself doing shameful things. We are just not going to hire you union workers." On another occasion, Ms. Chen said to the picketers, "Don't waste your time, we are not going to hire you union workers."

On May 22, 2011, Ivan, Rong and another union member, Sister Yua, were picketing. A woman[12] wearing a waitress uniform came out and said to the three picketers, "You union workers, you are so young, but you don't work. What are you doing here?" Yun then went back inside the restaurant.

The picketers continued to picket, and Rong began taking pictures of the sign. Yun then came out of the restaurant and said to Rong, "I'm just working here, why are you taking my picture?" Yun then pushed Rong a few times. Yun continued to yell at Rong and said, "You guys have nothing better to do, doing this kind of non-sense." Rong then took out her camera and began to point towards Yun, attempting to tape her tirade. Yun then grabbed the camera from Rong, threw it on the ground and broke it. Ivan reproached Yun and told her, "If you have something to say, just say it. Don't move your hands." Sister Yua also criticized Yun for using her hands and said, "You can just talk." Ivan then threatened to call the police if Yun "continued to do this." At that point, Ms. Chen and other waitresses pulled Yun inside the restaurant. As Yun was being pulled back into the restaurant, she said, "You union workers, we don't want to hire you, so what." Yun added that "our boss, our owner said that we are not going to hire you union workers."

On June 23, 2011, Ivan went to the restaurant to serve a court order that was issued in the Century Buffet court case on Respondent. At that time, Ivan took additional pictures of waitstaff employees. According to Ivan, he had not seen any of these individuals before, and they were not there in December 26, 2010, when he had applied for a job. Ivan as well as other union members picketed at Ocean Buffet once or twice a week since January of 2011. Rong

[12] She was later identified by Chen as Chen's cousin in a photograph taken by Ivan. According to Chen, his cousin's name is Yun Zhen Chen. (For ease of further identification, she shall be referred to as Yun.)

confirmed Ivan's testimony that during the times that she picketed at Respondent since January 2011, she did not see any individuals in the photographs taken by Ivan at Respondent's restaurant until June of 2011.

The record is not clear precisely what court order Ivan was serving on Respondent in June of 2011 when he took the pictures and observed the employees. However, the record does reflect that on January 28, 2011 a temporary injunction was issued by Judge Donna Mills of the New York Supreme Court in a case filed in New York Supreme Court, enjoining various defendants, including Peter, Maggie Lee, Millennium Building and Land Inc. and Chen d/b/a Ocean Buffet LLC, from transferring any interest in or encumbering various properties, including the Clifton, New Jersey address, where Respondent is located. The other properties mentioned in the injunction involved a location in Elmhurst, New York and Newark, New Jersey and Millennium Building and Land Inc. Further, on June 30, 2011, Judge Mills issued a decision and order in that case, wherein she found that after due deliberation, a cause of action exists in favor of plaintiffs against the defendants and that the plaintiffs are entitled to a preliminary injunction on the ground that the defendants threaten to or are about to act in violation of plaintiffs' rights respecting the subject of the action and tendency to render the judgment ineffectual. The decision grants the injunction, enforcing the defendants from transferring any interest or encumbering the properties described in the initial injunction, plus a payment of $500 by plaintiffs in bond with leave for defendants to apply to the court for transfer of interest of properties and increases of bond. The record also reflects that on February 4, 2011, the attorneys for the plaintiffs mailed a copy of Judge Mill's January 28, 2011 order to Chen, Peter and Lee and added "Please be guided accordingly."

These documents were part of the lawsuit filed by the plaintiffs in that case, who were also the discriminatees here. It appears to be an outgrowth of the lawsuit filed against Century Buffet, Peter and Steven Lam in Federal District Court, referred to in the prior unfair labor practice. Apparently, that action was amended to include Millennium Building and Land Inc., which is the corporation that owns the property, and Maggie Lee, who is a principal of that corporation as well as the wife of Peter Yeung, the owner of Century Buffet.

It appears that the plaintiffs in that federal court action took the position that all of the entities and individuals involved, i.e. Century Buffet, Millennium, Maggie Lee and Ocean Buffet, are one in the same and are jointly responsible to remedy the claims in the lawsuit. Indeed, the Union appears to be making that same contention here since it continued to assert that Ocean Buffet and Century Buffet are one in the same since the operation continued unchanged after the alleged change of ownership and the prior owner's wife is a principal in the landlord that owns the property, where the restaurant is situated.[13]

It further appears to me that the order involved was filed pursuant to an action filed in New York in order to attach property located in New York, where apparently Millennium (the landlord) owns a property.

Chen testified twice, once on the first day of the hearing as a 6(11)(c) witness and then again on the third day of the hearing as a 6(11)(c) witness, wherein he identified and testified about the payroll documents and wherein Chen furnished his own testimony concerning his hiring decision. Chen also furnished two pre-trial affidavits to the Region.

[13] I note that the General Counsel has not subscribed to that theory and has not alleged a single employer relationship between Respondent and Century Buffet.

According to Chen, he first learned about the restaurant in Clifton, NJ in September of 2010 when a friend of his, Jack Li, whom he used to work with in Pennsylvania, notified him about the opportunity to take over the restaurant. Li told Chen that he was working for the landlord (Millennium) of the restaurant and that the landlord was interested in obtaining a new tenant because the prior tenant was behind in its rent. Li also informed Chen that the restaurant was in a good location. According to Chen, he and Li visited the restaurant sometime in September and inspected the facility after it had closed for the day. He looked at the equipment, which was old but working, and the restaurant was neat and tidy. They discussed the restaurant, and they both agreed it was a very good location and that Chen should consider signing a lease. Chen testified that he asked Li how the restaurant was doing or how much money it was making. Li allegedly responded that he did not know. Chen asserts that he did not have a conversation with the prior owner (Peter) or Peter's wife, Maggie Lee, the landlord, prior to signing the lease. In fact, Chen claims that he did not know that Lee was the wife of Peter and did not find that out until after the Union filed its charges.

Chen testified that he initially was told that the landlord wanted $12,000 per month in rent, which included the fixtures and equipment at the restaurant. After discussion with his wife, Chen offered $10,000 and then went to China for a month.

After he returned from China in early December, Chen contends that Li contacted him and informed him that the landlord lowered his rent to $11,000, which Chen accepted. Chen asserts further that he never spoke to anyone from Century Buffet or Millennium before signing his lease on December 15, 2010. Chen further claims that he had no knowledge of any lawsuits by employees of Century Buffet against either Century Buffet or the landlord. He states that he would not have taken over the restaurant had he known about such lawsuits.

The lease that Chen signed was dated December 2010 and was signed by Maggie Lee on behalf of Millennium. It provides for a 10-year lease with rent at $11,000 for the first year and then yearly increases as provided in the agreement up to $13,000 per year, starting from 12/15/10 to 12/15/20.

The lease also contains a rider, which reads as follows:

Personal Guaranty
Consult your lawyer before signing this Agreement

Landlord: Millennium Building and Land, Inc

Tenant: Ocean Buffet LLC & He Chen

Premise: 166 Main Avenue, Clifton, NJ 07014

The undersigned parties, Millennium Building and Land, Inc. as the landlord, and Ocean Buffet LLC., as the tenant, regarding the demised premises located at 166 Main Avenue, Clifton, New Jersey, in consideration of the amount ten dollars ($10.00) paid to the tenant, and other good and valuable consideration, hereby agrees as follows:

1) Tenant waives any and all rights to sue the landlord regarding any employment-based claim which may arise as a result of the leasing of 166 Main Avenue, Clifton, NJ by the tenant.

2) Tenant acknowledges that there is no employer-employee relationship between landlord and tenant and that no such relationship arises from the terms of the lease between landlord and tenant.

3) Tenant will advise any of its employees that the tenancy of the tenant does not create an employee-employer relation between them and the landlord.

4) Tenant agrees to indemnity and hold landlord harmless from any action against landlord which may be instituted by tenants employees and which is based upon or make claim of employer/employee relations, duties and/or liabilities.

5) Tenant acknowledged that the landlord has been sued by prior tenant's employee for the worker compensation related issue and/or employment-based claim. Tenant waives any and all rights to sue the landlord for the same related issued[sic].

6) Tenant has been advised that the tenant might be sued by prior tenant's employee for any reasons. Landlord has no control, but tenant agree[sic] to indemnify and hold landlord harmless from any action against landlord.

7) Tenant has been advised that if the tenant fails to pay the monthly rent, which causes a period of more than 30 days without coverage by rent, it will be considered as an abandon of lease by Tenant.

Chen further testified that after he signed the lease, he decided to hire his staff solely from friends and relatives, and over the next one to two days, he hired his initial complement of employees from these sources.[14] He also asserts that he did not consider hiring any of the prior staff, who had been employed by Century Buffet. He did not do so because he states, "I don't need them. The quality of the staff members were good and the customers would like them."

According to Chen, the restaurant was opened for business on January 1, 2011, but he had hired his staff, as noted, one or two days after December 15. It is not clear from Chen's testimony precisely when these employees actually began working for Respondent although Chen did not refute the testimony of several of General Counsel's witnesses that a number of the waitstaff employees were present on December 26, 2010 when these individuals applied for work and when pictures were taken of Respondent's employees at that time.

Chen also testified that subsequent to his initial hiring of his staff, a number of waitstaff employees left, and Respondent replaced them with additional friends or relatives. Chen conceded that he did not consider for hiring any of the 10 discriminatees for these available positions even though he was aware that they had applied for these jobs and that all of them had experience as waitstaff employees, some of them with Century Buffet. Chen admitted that the primary reason that he did not hire any of the discriminatees was because the "union members" were picketing and affecting his customers and his business.

[14] Chen testified that he did not use any employment agencies or advertisements in order to staff his restaurant. However, his affidavit given on April 19, 2011 states as follows: "When I took over the restaurant, I had already hired a staff ready to operate the business. I found these people through friends and employment agencies. Some were people that I had worked with in the past. I did not need to and did not hire from the former restaurant."

Chen also testified that another reason that he did not hire the "union members" was because some customers had informed him that the waiters and waitresses did bad jobs as waiters and waitress when they were employed by Century Buffet. However, Chen did not provide any details as to which customers complained to him, the nature of the complaints or which specific employee the customer allegedly complained about.

Chen provided some testimony concerning the specific employees that he hired when he hired them and which ones were waitstaff employees, but his testimony in this regard is uncertain and contradictory and, at times, inconsistent with his own records and/or his affidavits.

As noted above, when union members went to apply for job on December 26, Ivan took pictures of employees, whom he saw at the restaurant. He testified that six of them were members of the waitstaff. This testimony was corroborated by Rong, who testified when she applied for a job, she went to the bathroom and "when I walked out, I saw there were six waiting staff there." According to Ivan, he was able to take pictures of three of the six individuals, whom he identified as waitstaff employees. According to Ivan, he recognized these individuals in Photographs A, B and D. Rong corroborated Ivan's testimony that these three individuals were waitresses that she saw at the facility on December 26. Rong also testified that the individuals in Photograph C, she also recognized as someone, whom she saw who was a waitress for Respondent on December 26. Both Ivan and Rong corroborated that the individual with glasses in Photograph D was the person, who identified himself as the manager and who dealt with and spoke to them, as described above.

Chen testified that the individual pictured in Photograph A as a waiter wearing a uniform seen by Ivan and Rong on December 26, 2010 as his son. He testified that all of the individuals in Photographs A-D were members of his waitstaff as of December 26, 2010, plus the manager, and that none of these individuals were working for Respondent by the spring or summer of 2011 and that almost all of them left. He did not recall the names of any of the other individuals in the pictures other than his son,

The pictures identified by Chen as Respondent's waitstaff employees included the three individuals identified by Ivan and Rong as waitstaff employees, whom they saw on December 26. In his second affidavit given on August 9, 2011, Chen stated that when he opened Respondent had three waitresses, which he identified from the photographs as individuals "B," "C" and "D," whose names he did not recall. He further stated that all three of these waitresses have left since the restaurant opened. At another point in his testimony, Chen identified another photograph of his son (taken by Ivan in June of 2011) and stated that his son does not and has not appeared on the payroll. Chen testified as to his son and the picture, "No, it's on Friday when he didn't go to school he came in." Chen did not testify how frequently his son worked for Respondent from December through June other than to state that he was never on Respondent's payroll.

Respondent did produce records pursuant to General Counsel's subpoena on the second day of the hearing. It consists of a document entitled "Ocean Buffet LLC Payroll Journal, January 1, 2011 – December 31 2011," which reflects the employees on Respondent's payroll from the payroll date of 1/8/11 through 9/30/11. It consists of 12 names. One name is He Yong Chen and has handwritten notation of "boss" on it. According to Chen, this individual is a kitchen worker and is not Chen himself. When asked why someone wrote "boss" next to the name on this sheet, Chen stated that it was written by someone else, maybe his son, but he wasn't sure.

The next name on the payroll is Yun Ying Chen. It has writing on it "cousin" and

"cashier." The document reflects that this employee worked continuously from 1/8/11 through 9/30/11, receiving wages and tips for each of these weeks. Chen also provided timesheets for Yun Ying Chen for the months of October, November and December of 2011, which showed wages for her. Chen testified that Yun Ying Chen was a waitress.[15]

The next name on the payroll is Mei Fu Feng. The payroll reflects that Feng started working for Respondent in June of 2011. Feng is Chen's wife and she worked as a waitress and received a salary and tips. Feng continued to work for Respondent as a waitress in October, November and December of 2011.

The next name on the list is Rui Hua Li, who Respondent hired as a waitress in June of 2011. According to Chen, Li was recommended to him by his female cousin, Xiu Mei Chen, and that Li worked somewhere else before he employed her, but he did not know where. The payroll reflects that she worked only in the quarter ending on 6/30/11. The payroll states next to her name "cousin's friend."

The next name on Respondent's payroll is Xue De Lin and the written words "Misc." and "Aunt's friend" are listed next to his name. The records reflect that he was hired in the payroll period ending on 6/30/11, and he received only wages and no tips. According to Chen, Lin was a helper and miscellaneous worker, front and back everything, who was an experienced restaurant worker from out of state.

Xin Fei Liu, according to the payroll records, worked from the period of 1/8/11 to 3/26/11 and the words "left" are marked on her sheet. She received wages and tips. Chen did not recall what job Liu performed but confirmed that only waitstaff receives tips.

Chang Yong Weng is listed on the payroll and as a former co-worker of the owner with "chef" written next to his name. According to Chen, this is incorrect; Weng is a friend of his, not a former co-worker. Further, Chen states that Weng was a cook, and the records reflect that he received only wages and no tips.

Hui Fang Yang is listed on the payroll with no accompanying writing but reflects that she worked from 1/8/11 through 3/26/11. According to Chen, Yang was a waitress, who had been recommended to Chen by his cousin (Xiu Mei Chen), and worked out of state before being employed by Respondent. She left Respondent's employ in March of 2011 to go out of state with her husband.

Me Quin Yang was listed on the payroll with "waitress" written next to her name. While the document states "cousin's friend," Chen testified that he hired Yang as a waitress because he had worked with her at a restaurant in Pennsylvania. The records reflect that she received tips as well as wages and worked at least through 9/30/11. According to Chen, Yang was still working for Respondent as of the date of the hearing (December 19, 2011), which is confirmed by the weekly timesheets submitted for the months of October through December.

Ye Na was listed in the payroll with "waitress" written next to her name and the words "friend of the owner." According to Chen, Ye was recommended to him by a friend of his (Ping Fa Chen), and she was an experienced waitress. She worked through March 26, 2011.

[15] This testimony is consistent with the payroll records, which reflected that she received tips, which Chen testified would only be given to waitstaff personnel. Chen did not testify who wrote "cashier" next to her name, but testified that she was not a cashier.

The payroll lists Bao Zhen Zhang as working from 1/8/11 through 9/30/11. Next to his name appears to be the word “chef” and “relative’s friend” on the side. That individual received no tips but a salary for these months, a salary comparable to that of Weng and Gong Quio Zheng, also listed with the words “chef” next to his name.

Chen was not asked about Zhang initially when he was questioned about the payroll records, but when General Counsel inquired of the timesheet of Zhang, Chen initially testified of Zhang that “he’s a waiter,” then changed to “Sorry, she’s a waitress.” General Counsel asked if she was not a chef, she doesn’t work in the kitchen. Chen replied no. I note, however, that both of Zhang’s payroll records for the period of January through September and the timesheets for the months of October through December reflect that that individual received only wages and no tips.

The last name listed on the payroll record is Gong Quio Zheng with the name “chef” listed next to his name as well as the word “uncle.” Chen was not asked about this individual, but the records reflect that he worked from 1/8/11 through 9/30/11 and reflects only salary for him (no tips) with a comparable number to that of Weng and Zhang.

Chen also testified at one point, somewhat puzzlingly, that he only hired “two people from the beginning.” When asked later who these people were, Chen testified that they were Weng, who works in the kitchen, and Zhang, who he identified as a waiter, who works in the dining area. At another point in his examination, Chen was asked how he decided how many waitresses and waiters to hire. His response was “for waitstaff and for example as three to four or five, four to five people, depending on the business and there’s no reason to hire all of the people in the beginning. If the business is good, I can hire more.” To further confuse the record, in his affidavit, Chen states that when he “opened the restaurant we had three waitresses.” He identified them in the affidavit as individuals labeled “B”, “C” and “D”, who he stated in the affidavit that “all three have since left the restaurant.”

His affidavit confirmed his testimony that the former manager in the picture was employed at the opening and he left since to go back to school.

Chen also provided testimony concerning individuals in other pictures taken by the Union in December of 2010. He identified a woman in a photograph as Ming Ming Yang, his niece. According to Chen’s affidavit, Ming Yang comes to the restaurant on some Fridays to learn how to work in the restaurant and is not paid for her work. In his testimony, Chen states that Ming Yang comes to the restaurant sometimes on Fridays and sometimes on Sundays to help and learn how to work in a restaurant. He adds that she came to learn to “do waitresses [waitressing], to learn business,” and that she was a college student. Chen did not testify when she worked for Respondent or for how long, but he confirmed in his affidavit that she received no pay and did not appear on Respondent’s payroll.

Chen identified a picture of an individual as Yun Zhen Chen. She, according to the affidavit, comes from New York, perhaps one or two times per month, to help out when the manager is away. She is not paid for helping out and is not on the restaurant payroll. In his testimony, Chen stated that she comes on Friday and some Sundays, once or twice a month. Chen stated that she is his cousin, who he endearingly referred to as his “little sister.” He also testified that she “doesn’t do anything” but is just “hanging around” when she comes. I note that this individual is the person, who had the confrontation with Rong, described above, wherein she grabbed Rong’s camera, threw it to the ground and broke it.

Chen also provided testimony concerning the individuals' pictures in photographs taken by Ivan when he went to the restaurant to serve a court order on June 23, 2011. According to Ivan, he saw these five individuals, labeled as "H," "I," "J," "K" and "L," for the first time on that date. Rong also testified that she did not see these five individuals at the restaurant until June. She did not testify as to when in June she saw these individuals or how frequently. However, Rong noted that she had been at the restaurant picketing regularly between January and June. Similarly, Ivan did not testify how frequently he saw these five individuals other than on June 23. Chen testified that the individual labeled "H" was his son. He further testified this was a Friday when his son comes in to work when he is not in school. Chen testified, as he had before, that his son did not get paid and wasn't on the payroll. Individual "L," according to Chen, was a classmate of his son, who comes to the restaurant to learn how to serve drinks and handle plates of food, and she comes in some weekends. He did not say how often that individual came to work. She also did not get paid for any of her services and did not receive any tips. Chen was asked about the individual labeled "I" and testified, "I don't know her name at all because for waiting staff I really don't know their names."

Chen testified that the individual labeled "J" on the photographs was a waitress, but he didn't know her name. He believed that her English name was Quie. Chen identified the individual labeled "K" as "Nicky," but he did not know her Chinese name. According to Chen, "Nicky" was not on Respondent's payroll at the time of the trial but was on the payroll in 2011. Chen did not specify when she was on Respondent's payroll or how long she worked for Respondent. In his supplemental affidavit, Chen stated, "The individuals labeled I, J and K are all my relatives, who came to learn the business. They are not paid for anything they do. The person labeled L is a friend of my son, who sometimes comes in to the restaurant on Fridays to learn things like how to serve drinks and handle plates of food. She is not paid for whatever she does at the restaurant."

After being confronted with this statement in his affidavit, Chen still insisted that "Nicky" was at one time on Respondent's payroll, but that none of the others were ever on its payroll. As to these individuals, Chen testified that he didn't pay them anything, even in cash. Chen stated, "I didn't pay because they came to learn. Why should I give them money?" Chen also testified that none of the individuals received shares of customers' tips while they were working for Respondent.

Further, in this supplemental affidavit, which was, as noted, executed on April 12, 2011, Chen stated as follows: "The people, who work at the restaurant now work as waitresses and doing the other front of the house work are: Rui Ha Li, Xue De Lin and my wife, Mei Fu Feng."

At another point in his testimony, Chen stated that he hired two people from the beginning as his waitstaff and then added that he hired three, four or five depending on the business. When asked who the two people were on Respondent's payroll from the beginning were, Chen testified that they were Weng, who works in the kitchen, and Bao Zhen Zhang, who works in the dining area. As noted above, Chen referred to Zhang as a waiter, although previously in his testimony he had identified Bao Zhen Zhang as a female, who worked as a waitress.

My findings above are based on a compilation of the credited portions of the testimony of Ivan, Rong, Weng, Lam, Maoi Yang, Mei Fang He (He) and Chen. Most of the findings are based on undenied testimony from General Counsel's witnesses since Respondent did not call Xu, Ms. Chen or Yun as witnesses to deny or contradict the testimony concerning their conduct, which I have credited above.

Chen did testify and did dispute the testimony of Ivan and Rong in certain respects. More specifically, he denied that he observed the former Century Buffet employees picketing before he took over the restaurant and denied that he personally spoke to the discriminatees on either December 26 or December 29 when they applied for jobs with Respondent. Chen did not deny that the employees applied for jobs on these days, but asserts that he did not speak to them on those occasions but that his manager dealt with the applicants.

I do not credit Chen's denials and credit the mutually corroborative, consistent and believable testimony of Ivan and Rong and Yang. I found Chen's testimony generally to be unpersuasive, disjointed and unconvincing. As detailed above, it was often contradicted by his own affidavit and/or Respondent's payroll records. He could not testify with any accuracy as to his staffing process, who were his employees, how long they worked for him or what jobs that they had, and even in once case, the gender of one of his employees.[16]

Chen also testified that he did not know anything about the picketing by Century Buffet employees when they were employed by Century Buffet or the fact that some of these employees had filed a lawsuit against Century Buffet and/or the landlord while they were Century Buffet employees. However, his testimony is simply not believable for a number of reasons, particularly, because the lease, signed by Respondent with the landlord, makes specific reference to litigation between employees of Century Buffet and the landlord.

Based on the above factors, I credit the discriminatees' testimony as reflected in my above recitation of the facts.

IV. Analysis

In *FES,* 331 NLRB 9 (2000), the Board set forth the analytical framework for refusal-to-hire violations. The General Counsel must show that:

> (1) that the Respondent was hiring or had concrete plans to hire, at the time of the alleged unlawful conduct; (2) that the applicants had experience or training relevant to the announced or generally known requirements of the positions for hire, or in the alternative, that the employer has not adhered uniformly to such requirements, or that the requirements were themselves pretextual or were applied as a pretext for discrimination; and (3) that antiunion animus contributed to the decision not to hire the applicants.

In contrast, to establish a discriminatory refusal to consider, the General Counsel must show that (1) the Respondent excluded applicants from a hiring process; and (2) that antiunion animus contributed to the decision not to consider the applicants for employment.

Once this is established, the burden shifts to the employer to show that it would not have considered the applicants even in the absence of their union activity or affiliation. Similarly, once the elements of a refusal-to-hire violation are established the burden shifts to the employer to show that it would not have hired the applicants even in the absence of their union activity or affiliation.

[16] For example, he testified at one point that Bao Zhen Zhang (Zhang) was a "waiter" and then changed it to that Zhang was a "waitress." He insisted that Zhang was a waitstaff employee although his payroll records indicated that Zhang is a kitchen worker.

The Board concluded further in *FES* that in a discriminatory hiring case whether the alleged discriminatees would have been hired but for the discrimination against them must be litigated at the hearing on the merits. The General Counsel must show that there was at least one available opening for the applicants. He must show at the hearing on the merits the number of openings that were available. However, where the number of applicants exceeds the number of available jobs, the compliance proceeding may be used to determine which of the applicants would have been hired for the openings. Once the compliance proceedings determine which applicants must be offered jobs and backpay, the remaining applicants would be entitled to a refusal to consider remedy. Id. at 14.

In applying the principles of *FES* to the instant case, General Counsel asserts that it has met its burden of establishing that the discriminatee applicants had experience and training necessary for the positions available since they were all experienced waitstaff employees and that Respondent had concrete plants to hire since it is clear that Respondent needed to hire and did hire an entirely new staff when it started operating the business.

However, while I agree with General Counsel that the evidence here does establish these elements of proof deemed necessary in *FES*, I do not agree that it is essential in the context of this case for General Counsel to have made such a showing.

Thus, in *Planned Building Services*, 347 NLRB 670 (2006), the Board modified the evidentiary burden set forth in *FES* in cases where the refusals to hire and/or refusals to consider for hire occur in a successorship context. The Board stated where, as here, the complaint alleges that a successor employer has discriminated in hiring against its predecessor's employees in order to avoid a bargaining obligation to the union, the initial burden of proof set forth in *FES* are not required. Specifically, the Board stated that it serves no purpose in a successorship case, where an incumbent work force has been performing the jobs in question to require the General Counsel to prove that the relevant employees have relevant training and experience. Similarly, because a successor employer must fill vacant positions in starting up a business, there is no reason to require the General Counsel to demonstrate that the employer was hiring or had concrete plans to hire. Indeed, the Board held that a discriminatory refusal to hire requires the General Counsel to prove (only) that the employer refused to hire employees of its predecessor and was motivated by antiunion animus. *Mammoth Coal Co.*, 354 NLRB #83 (2009) fn. 7 slip op at 2, citing *Planned Building Services* at 673.

Therefore, here, the essential element for General Counsel to establish is whether Respondent's decision not to hire or consider for hire the discriminatees was motivated by antiunion animus.

I find that General Counsel has established a compelling *prima facie* case that Respondent's conduct was so motivated.

Particularly significant are the comments of Xu, Respondent's manager, when the initial group of discriminatees sought jobs on December 26, 2010. Xu asked the employees what they wanted, and Ivan replied that they were Local 318 Union members and came to look for jobs. Xu replied, "Didn't you file a suit against the boss here? Didn't he give you unemployment benefits?" This comment by Xu reflects that Respondent was aware of the employees' lawsuit against Century Buffet as well as the Union's unfair labor practice charges against that restaurant. This is a crucial element of General Counsel's *prima facie* case as it must be established that Respondent was aware of protected conduct of the discriminatees when it made its hiring decision.

I find Xu's comments made to the five discriminatee applicants on December 26, 2010, apparently the first day that Respondent had employees on staff and five days before it opened for business on January 1, 2011, to be highly suggestive that Respondent was aware of the litigations involving the prior Century Buffet employees and Century Buffet when it made its hiring decisions. This conclusion is further supported by other facts detailed above. Significantly, the unfair labor trial in *Century Buffet* before Judge Davis closed on December 9, 2010. Two days later on December 11, Century Buffet informed its employees that it would be closing on December 12. Thus, on December 13, three of the discriminatees, plus union representative Weng, went to the restaurant to picket and pass out pamphlets to any customers, who may be passing by. The discriminatees and Weng posted signs on doors of the restaurant stating that Century Buffet violated the National Labor Relations Act and that members are picketing and protesting. This picketing and sign posting continued on an every other day basis. On December 21, Ivan, Rong and three other union members returned to the restaurant to picket and repost the notices. Ivan and Rong both saw Chen inside the restaurant on that day looking at the employees through the window while they were picketing and putting up their signs on the restaurant doors. It is noteworthy that this incident occurred five days before the employees first applied for jobs on December 26.

Moreover, when the employees applied on December 26, they also spoke to Chen in addition to Xu. Chen asked what the employees were doing there. Ivan replied that they were looking for jobs and added that "we worked in that restaurant before." Significantly, Chen replied that he knew that and admitted that he had seen the employees picketing at the restaurant a few days before. This admission by Chen serves to confirm Rong's and Ivan's testimony, as I detailed above, that Chen did see the picketers on December 21, 5 days before the 26th when employees were present at the restaurant, apparently preparing for the actual opening for business on January 1, 2011.

It is also significant that some employees of Century Buffet and other union members were picketing[17] Century Buffet restaurant starting in March of 2010. The picket signs and leaflets given to customers protested Century Buffet's unfair labor practices and unfair treatment of its workers, including forcing workers to work 72 hours a week, not paying wages, deducting 16% from credit card tips and forcing employees to pay for runaway checks. The signs also mentioned the lawsuit that had been filed by Century Buffet workers in federal court and asserted that Century Buffet retaliated against employees for filing the lawsuit and supporting the Union. Additionally, the signs made specific reference to the discharge of Jessica, asserting that she "took time off after getting a miscarriage from being overworked and the employer refused to let her come back to work."[18]

Furthermore, on January 13, 2011, while several of the discriminatees were continuing their picketing, they were confronted by Xu. Xu told the demonstrators, "You union workers, you made previous restaurant close and now you are making trouble here." Xu then informed the workers that "this thing has nothing to do with the new employer here, just move along." These comments of Xu, coupled with the timing of Century Buffet's decision to close on December 12, 3 days after the unfair labor practice trial closed, strongly supports the conclusion that I make that Respondent was aware of the litigations between the Union and employees against Century Buffet before it signed its lease and before it made its staffing decisions.

[17] The picketing occurred once or twice a week for 1-2 hours a day.

[18] The Board subsequently found that Century Buffet violated Section 8(a)(1) and (3) of the Act by such conduct.

I also conclude, in agreement with General Counsel, that it is highly unlikely that Chen would not have been unaware of the litigation in view of the prior picketing in 2010 by Century Buffet employees at the restaurant and that Chen's testimony that he came to the restaurant only once before signing the lease on December 15, 2010 is not credible. I find it probable that Chen would have gone to the restaurant prior to December 15 and would have seen the Century Buffet employees picketing and distributing leaflets to customers, publicizing their disputes with Century Buffet.

This conclusion is further buttressed by the fact that the lease signed by Chen on December 15 contained clauses making reference to suits filed by Century Buffet employees against the landlord for worker's compensation related issues and/or employment-based claims and that Respondent acknowledges awareness of such claims and waives it rights to sue the landlord for the same related issues.[19]

The foregoing evidence is convincing that Respondent was aware of the litigations between the employees and the Union and Century Buffet, the landlord and Peter and his wife before it signed its lease. I also find it likely that Respondent did not believe that it would be or should be responsible for remedying the matters in those litigations since it was a new company with no relationship with either Century Buffet or the landlord, other than as a tenant of the property.

This conclusion is supported by the statements made by both Chen and Xu to the picketers that they should not be picketing Respondent, that their disputes were with Century Buffet and the Respondent is a separate company.

I also find it likely that although Respondent did not believe that it was or should be responsible for remedying the employees' claims against Century Buffet (or the landlord), it was not desirous of employing employees, who might be likely to file similar claims against Respondent and who had been supported and been represented by the Union while they were working for Century Buffet.

I find that the evidence strongly supports the conclusion that in view of Respondent's awareness of the former Century Buffet's employees aforementioned conduct (lawsuits, unfair labor practice charges and union support) that when it made its hiring decisions, it excluded any former Century Buffet employees from consideration when it decided on who to hire in its initial complement of employees, starting on December 26, 2010 and continuing throughout 2011 when some of its employees whom it initially hired left the job and Respondent hired replacements for these departing employees.

This conclusion is supported by substantial evidence starting with the aforementioned statement of Xu, referenced above, in discussing Respondent's knowledge of the employees' litigation with Century Buffet and their prior union support. Xu asked five applicants on December 26, 2010, "Didn't you file suit against the boss here? Didn't he give you employment benefits?" This rhetorical question is suggestive of the fact that Respondent's failure to hire them was based on animus towards this protected conduct (the lawsuit). The fact that there is no evidence that Xu was involved in the decision not to hire these employees is inconsequential

[19] I note in this regard that the employees' lawsuit against Century Buffet and Peter (its owner) was amended to include Millennium (the landlord) and Maggie Lee, a principle of Millennium and the wife of Peter, as additional defendants.

since it is reasonable to infer that Xu as manager and a supervisor did know why decisions not to hire the employees were made. *TCB Systems Inc.*, 354 NLRB #162 slip op at 3 (2010) (statements of supervisor providing an explanation for hiring decision supportive of finding of unlawful motivation, even though supervisor was not personally involved in decision). See also *Grand Canyon Mining Co.*, 318 NLRB 748, fn. 2 (1995), enfd. 116 F.3d 1039 (4th Cir. 1997) (relying in part on supervisor's specific post-layoff statement that a particular employee had been laid off because of his union activity). Further, on January 13, 2011, Xu came outside and addressed the union picketers, which included some of the discriminatees. Xu said, "You union workers, you made previous restaurant close and now you are still making trouble here." This comment is reflective of Respondent's continued animus towards the employees protected conduct and suggestive that Respondent did not hire and did not consider hiring the discriminatees because of their protected conduct of filing the lawsuit against Century Buffet, joining the Union and picketing in protest of Respondent's unfair labor practices of failing to hire them.

Indeed, Xu's comments are consistent with Chen's on statements made to employees on the record and in his brief. Thus, on December 29, 2010, after the second group of five union employees came to apply for jobs, the employees spoke to Chen after they had submitted their names, addresses and phone numbers to Xu. Chen said to that group of employees, "You are from 318, we are not hiring."

Additionally, although Chen consistently took the position throughout the trial and in his brief that he hired his initial staff in December of 2010 before he became aware of any union activities or picketing or prior lawsuits involving Century Buffet employees, he also conceded that he hired some new employees in March 2011 due to some departures. Chen further conceded that he did not hire or consider hiring any of the 10 discriminatees of whom had applied for jobs (and whom Respondent had promised that it would contact if it had any openings in the future) because they engaged in picketing and were union supporters. Chen also criticized the picketers for "making trouble" and said to them "You union members always make trouble." Indeed, in his brief that he filed, Chen stated, "Restaurant work is a service industry, but I did not hire them because they are from the trade union and don't respect others and behave rudely."

While it is somewhat understandable that Respondent might not be pleased with the conduct of the Union and the employees picketing his restaurant and informing customers that they are protesting Respondent's conduct, but the fact is that this is clearly protected activity engaged in by the employees and the Union, and Respondent cannot lawfully retaliate against these employees by failing to hire them for engaging in such protected conduct. *Five Star Transportatio*n, 349 NLRB 42, 47 (2007) (refusal to hire drivers because of critical comments made about employer's operations by drivers of predecessor in letters to school committee considering bid by employer to obtain contract unlawful as drivers engaging in protected concerted activity by engaging in such conduct).

I also note in this regard that as of January 13, 2011, the Union and its members, including the discriminatees, continued to picket adding Ocean Buffet to their signs and leaflets and accusing Respondent of discriminating against union workers and demanding that Respondent "reinstate union workers." The leaflet passed out by the employees and the Union described the prior litigation between Century Buffet and the employees, including both the federal lawsuit and the NLRB complaint. The leaflet also reflects that on December 12, two days after the Board indicated that they plan to seek an injunction to force Century Buffet to reinstate

a worker, who got discharged,[20] and the employer closed down the restaurant and reopened two weeks later under the name of Ocean Buffet. Ocean Buffet and Century Buffet are essentially the same. Thus, the Union and these employees were claiming that Century Buffet and Respondent are the same company and both were responsible for remedying Century Buffet's unlawful conduct (the lawsuit and unfair practices). The leaflet asked the public to demand that Ocean Buffet, Century Buffet "reinstate the workers illegally fired" and "stop discrimination and retaliation against union workers." The fact that the leaflet may not be correct in its basic assumption that Respondent and Century Buffet are one in the same company[21] does not change the fact that the employees were engaging in protected concerted activities by picketing and making these claims in its leaflets and on signs. I do note that the demonstrators were clearly protesting Respondent's failure to hire the former Century Buffet employees by demanding reinstatement and backpay for workers illegally fired. Although the demand is somewhat inelegantly framed as an illegal firing rather than a refusal to hire, it is consistent with the Union's claims that Respondent and Century Buffet were one company so that the decision to close down and terminate employees and not to hire them back as employees of Respondent is tantamount to a discharge.

Additionally, I have found that Ms. Chen on several occasions came out to the picket line to chastise the picketers for their conduct. In the course of this conduct, she twice told the picketers not to waste their time because "we are not going to hire you union workers." Similarly, on May 22, 2011, Yun came out of the restaurant while employees were picketing, criticized their conduct, assaulted Rong, a discriminatee and one of the picketers, and grabbed Rong's camera and broke it. As Yun was being pulled back into the restaurant by Ms. Chen and other waitresses, Yun said, "You workers, we don't want to hire you, so what…Our boss, our owner said that we are not going to hire you union workers."

I find it appropriate to consider the comments and conduct of Ms. Chen and Yun as further evidence of Respondent's animus towards the protected conduct of the discriminatees. While neither Ms. Chen nor Yun are supervisors of Respondent, they can be considered agents of Respondent and their statements and conduct attributable to Respondent, if under the circumstances employees would reasonably believe that the alleged agents were acting on its behalf when he or she took the action in question. *California Gas Transport, Inc.*, 347 NLRB 1314, 1317 (2006). I find that in the circumstances here employees would reasonably believe that both Ms. Chen and Yun were speaking for management. Thus, both of these individuals came out to the picket line to criticize the picketers for engaging in their protected conduct in front of the restaurant and informed them that "we are not going to hire you union workers" (Ms. Chen) and "our boss, our owner said we are not going to hire you union workers" (Yun). It is certainly reasonable for the employees to conclude that Ms. Chen and Yun were speaking for management in these circumstances, particularly, since the comments are similar to statements made by Chen himself and by Xu, Respondent's manager. *D&F Industries*, 339 NLRB 618, 620 (2003) (assistants to manager found to be agents in part because their statements were consistent with other similar statements made by other management representatives); *Hausner*

[20] The record does not contain any evidence concerning any alleged plan to seek an injunction. However, it suggests that the Region had informed Century Buffet that it intended to seek 10(j) relief to remedy Jessica's discharge, which, as noted, was litigated in the Board trial, which closed on December 10.

[21] I note that General Counsel has not alleged a single employer relationship between Respondent and Century Buffet or with Millennium. The plaintiffs in their lawsuit are taking that position and are still pursuing those claims in their lawsuit since it added Respondent as a defendant in that lawsuit.

Hard Chrome of KY, Inc., 326 NLRB 426, 428 (1998) (Board finds that agency finding for department heads is strengthened by fact that their statements echoed statements made by admitted agents of employer).

Furthermore, when the employees entered the restaurant on December 26, Ms. Chen asked what they were doing there. Ivan, their spokesperson, told her that they were looking for jobs. Ms. Chen replied that Respondent didn't need anyone, but instructed the five applicants to write down their names, addresses and phone numbers on a pad that Ms. Chen handed to these applicants. They complied with her instructions and returned the pad with the information filled out to Ms. Chen. In such circumstances, it is reasonable to conclude that although Ms. Chen may have only been a cashier, hostess or waitress that Respondent placed her in a position, where employees would reasonably believe that she was speaking for Respondent when she commented concerning the hiring process. *CNP Mechanical, Inc.*, 347 NLRB 160, 169 (2006) (administrative assistant, who responded to inquiries from employees seeking employment, was agent of employer when she told applicants that they weren't a union shop"); *GM Electrics*, 323 NLRB 125, 126 (1997) (secretary found to be agent of employer, where she distributed and collected job applications and discussed hiring needs with applicants); *Diehl Equipment Co.*, 297 NLRB 504 fn. 2 (1989) (bookkeeper/secretary found to be agent, where she handed job applicants to individuals and received completed application forms from them).

Furthermore, with respect to Yun, she was a cousin of Chen, and, indeed, Chen endearingly referred to her as his "little sister." I find that this is additional support for finding that employees would reasonably conclude that she was also speaking for management when she told employees that "our boss, our owner said that we are not going to hire you union workers."

Therefore, since both Yun and Ms. Chen are agents of Respondent, their comments to employees are persuasive evidence of Respondent's animus towards the discriminatees because of their protected conduct. *Merrill Iron & Steel Inc.*, 335 NLRB 171, 173-174 (2001).

I also rely upon Chen's admissions in his testimony and his brief that he did not consider hiring any of the applicants when he admittedly had openings after some of his initial staff left because of their protected conduct (i.e. the picketing and leafleting customers and their union support).[22]

Accordingly, the evidence is compelling that Respondent made a decision to exclude the former Century Buffet employees (Ivan, Amy, Rong and Jessica) from its hiring process based on its animus towards their protected conduct and its desire not to hire employees, who might engage in similar conduct if employed by Respondent (file lawsuit based on work related claims and support the Union). It supports the conclusion that Respondent actually refused to hire the four discriminatees, who had been employed by Century Buffet (Ivan, Rong, Jessica and Amy) in its initial decision to staff its restaurant as well as later on in 2011 when it filled jobs due to departures from its initial employee complement. Therefore, General Counsel has met its burden of proof that Respondent's actions in these regards were motivated by animus towards the employees' protected activities. Thus, the burden shifts to Respondent to prove that it would have taken the same action absent their protected conduct.

I find that Respondent has fallen short of its burden in this regard. The analysis of this question must be broken down into two parts. First is the decision of Respondent not to hire or to consider for hire the discriminatees for its initial complement of employees. As to this issue,

[22] In his brief, Chen states that "I did not hire them because they are from the trade union."

Respondent's defense is essentially that it hired its staff solely from friends and relatives and had no need to consider hiring the former Century Buffet employees. This defense is premised on Chen's assertion, which I have rejected above, that he did not know anything about the lawsuit, the unfair labor charges or any dispute between the employees and the Union and Century Buffet or the landlord prior to his decision on how to staff his restaurant. I also do not credit Chen's unsupported and unbelievable testimony that he staffed his restaurant within one day of his signing the lease on December 15, 2010.

I find that testimony highly suspect and that it is particularly undermined by his affidavit, which states that he used employment agencies in part to staff his restaurant before starting its operations. While it is not unlawful on its face to staff a new operation with friends or relatives, it certainly raises suspicions that a new employer would not even consider hiring any of the employees, who formerly worked for the restaurant and had experience performing the work required. Notably, Chen testified that he had not spoken to Peter or anyone from Century Buffet before he took over and that he had no information about the qualifications or abilities of waitstaff employees before he decided not to hire them. Thus, Respondent has provided no legitimate explanation for it failure to consider for hire or to hire any of the former century Buffet employees.

I find that Respondent has failed to establish that it would have refused to consider for hire to refused to hire these four discriminatees absent their protected conduct and has, therefore, violated Section 8(a)(1) and (3) of the Act.

I cannot and do not find that General Counsel has established that Respondent initially refused to consider for hire or refused to hire the six remaining discriminatees. None of them had been former Century Buffet employees and could not have been excluded from the hiring process as were the four former Century Buffet employees. While it is true, as General Counsel point out, that the six other discriminatees had picketed from time to time at Century Buffet in support of the Century Buffet workers while Century Buffet was open, that is insufficient to conclude that Respondent was aware of such conduct. While I have found above that it is likely that Chen would have seen former Century Buffet employees picketing and read the signs and became familiar with the prior litigations, that is a far cry from concluding that Chen would have seen and been able to identity and remember the specific non-Century Buffet employees, i.e. the six discriminatees here, who were not Century Buffet employees but who had picketed at that restaurant. Therefore, General Counsel has not established that Respondent had knowledge of any protected conduct of these six discriminatees when it initially staffed its restaurant in December 2010.

However, Chen conceded that Respondent had a number of openings to fill in 2011, starting in March of 2011 when some of his initial staff left the restaurant. He admitted that he failed to consider for hire or failed to hire any of the 10 discriminatees for these available positions (all of whom had applied on December 26 or 29) because they engaged in protected conduct of picketing and leafleting customers and because of their union membership. Therefore, a strong *prima facie* showing has been made that this conduct was based on animus towards protected conduct, shifting the burden to Respondent to prove that it would have refused to consider to hire the discriminatees absent these activities. In this regard, Chen did present some testimony that he received some complaints from customers after he opened, wherein they allegedly complained to him about some of the former waitstaff employees while they were employed by Century Buffet. Chen testified that this was an additional reason why he did not hire or consider hiring the discriminatees when he had openings starting in March of 2011. This testimony is clearly insufficient, even if credited to meet Respondent's *Wright Line* burden. Thus, Chen testified only that these complaints were only an additional reason for his

decision for not considering or hiring them. Since the primary reason for not considering or hiring the discriminatees for these positions was (based on Chen's own testimony) their protected conduct, Respondent cannot be found to have established that it would have considered for hire or failed to hire the discriminatees absent their protected conduct.

Moreover, the testimony adduced by Chen as to the alleged complaints by customers about employees was vague, non-specific and most importantly did not identity any alleged discriminatee as having been complained about by customers. Therefore, Respondent has failed to meet its burden of proof. I find that Respondent has violated Section 8(a)(1) and (3) by refusing to hire and refusing to consider for hire the discriminatees when vacancies occurred in March of 2011 and thereafter.

My findings above are somewhat complicated by the absence of clear evidence of when and how many openings Respondent had after it opened its restaurant on January 1, 2011. The evidence is also uncertain as to the number of waitstaff jobs available at Respondent in its initial hiring and thereafter. This complicated the issue of precisely who can be found to be discriminatees and when *vis a vis* the refusal to hire and who should be considered discriminatees only for the purpose of the refusal to consider violation.

I note that there are 10 discriminatees here. Five of them, Ivan, Jessica, Rong, Amy and Yia Yun Gao (Gao) applied for jobs with Respondent on December 26. Four of these individuals were former Century Buffet employees and one (Gao) was not although she had picketed at Century Buffet in support of Century Buffet employees' complaints against Century Buffet. On December 29, five more union members applied for jobs with Respondent, Mao Yang (Yang), Mei Fang He (He), Yu Jia Lin (Yu), Hui Lin (Hui) and Jian Zhing Luo (Luo). None of these five were formerly employed by Century Buffet, but, as noted, all of them participated in picketing at Century Buffet prior to Century Buffet closing.[23]

The evidence is also unclear as to precisely when Respondent made its initial hiring decisions. It is clear that, however, by December 26, it had decided to hire a number of waitstaff employees and that when it made that decision it excluded all former Century Buffet employees from the process based on their protected conduct. I have found above that Respondent, therefore, unlawfully refused to consider hiring Ivan, Jessica, Amy and Rong for hire in its initial hiring decision. I cannot find that the remaining discriminatees, who applied on December 26 or 29, were excluded from the initial process of consideration of hiring because they were not employees of Century Buffet. As I have described above, it is true that they all had picketed at the restaurant in support of Century Buffet employees' disputes with Century Buffet prior to the closure. I could not find that Respondent was aware of these facts and could not find that they were excluded from the hiring process prior to December 26 since they had not been excluded from the hiring process and Respondent had not unlawfully refused to consider them for jobs.

Thus, when Respondent unlawfully refused to consider Ivan, Jessica, Rong and Amy for hire in its initial employment of employees on December 26, it also refused to hire these four discriminatees in violation of 8(a)(1) and (3) of the Act. My discussion above concerning Respondent's failure to meet its *Wright Line* burden applies equally to the refusal to hire allegations *vis a vis* for these four discriminatees (as well as for the subsequent refusal to consider for hire all ten discriminatees).

[23] As noted above, however, I found little significance to the prior picketing of these union members at Century Buffet since it cannot reasonably be found that Respondent was aware of such conduct by any of these six discriminatees.

Accordingly, Respondent refused to hire Ivan, Rong, Jessica and Amy on December 26, 2010 in violation of Section 8(a)(1) and (3) of the Act. In making this finding, I note that it is essential to determine the number of waitstaff positions available when these four discriminatees applied on December 26, 2010. The record, as noted, is uncertain as to this issue, as will be detailed below.

However, since it is clear that at least five positions were available, I can and do find that Respondent refused to hire these four discriminatees as of that date and that they should be offered instatement and backpay from December 26, 2010.

As to the refusal to hire allegations concerning the other six discriminatees that is complicated by the lack of evidence of precisely how many waitstaff positions Respondent had at any particular time, including when it started operating the restaurant. It is essential for that issue to be resolved before it can be determined which of the additional discriminatees Respondent refused to hire. While ordinarily this issue should be determined in this proceeding, I find it appropriate here to partially save these issues for compliance due to the confusion in this record about Respondent's staffing caused in part by Respondent's submission of incomplete records and Chen's confusing testimony.[24] *U Ocean Palace Pavilion*, 345 NLRB 1162 fn. 2, 1175 (2005).

These problems exacerbate my finding of how many waitstaff jobs were available and filled by Respondent on December 26, 2010. However, I can and do find in accordance with the record that Respondent's initial complement included five waitstaff employees. These employees were Xin Fei Liu, Hui Fang Yang, Me Quin Yang, Ye Na and Yu Ying Chen. There can be no question as to the status of Xin Fei Liu, Hui Fang Yang, Me Quin Yang and Ye Na. All four of these employees were listed on the payroll as receiving tips and/or had "waitress" written by their names, and Chen testified that they were all waitresses. Yun Ying Chen had the words "cashier" written next to her name. However, the payroll records reflect that she received tips as well as wages, and Chen unequivocally testified that Chen was a waitress. In these circumstances, I find the evidence sufficient to conclude that Chen was a waitress and that Respondent had filled at least five waitstaff positions as of December 26, 2010.

Where the record is confusing is with respect to employee Bao Zhen Zhang. The payroll records contain the written notation that this employee was a "chef", and it reflects that he received a salary with no tips and his salary is comparable to that of other employees listed as chefs on the payroll. However, Chen twice testified that this employee was a waitstaff employee and at one point testified that this employee was a waiter and at another point that the employees was a waitress. Based on Chen's admission, General Counsel contends that Zhang should be found to be a waitstaff employee and the Respondent be found to have hired six waitstaff employees by December 26. I cannot agree and find rather that the record is too confusing on this issue and that the compliance stage needs to resolve the question of Zhang's status.

I find, however, that the significance of this finding relates only to the refusal to consider and the refusal to hire subsequent to December 26, 2010. Thus, as of December 26, 2010, I find that Respondent had five and possibly more waitstaff positions, and it unlawfully refused to

[24] I note for example that the payroll records submitted do not include the job classification of the individual but included handwritten notations, some of which were disputed by Chen or where Chen did not recall who made these notations.

hire Ivan, Rong, Jessica and Amy as of that date. It did not unlawfully refuse to hire the other discriminatees as of that date when one of them applied or on December 29 when the other five applied since Respondent's decision to hire its initial complement was unaffected by any animus towards these employees' protected conduct of which Respondent was not aware at that time.

Subsequent to December 26, 2010, however, as related above, Respondent had additional openings for positions that became available as a result of departures from its initial complement of waitstaff employees. By that point, the other six discriminatees had all applied for jobs with Respondent, had picketed Respondent and were clearly placed in the same position as the four former Century Buffet employees in terms of hiring for these positions. They were all excluded from the hiring process for these openings based on their protected conduct. I, therefore, find that Respondent unlawfully refused to consider all ten discriminatees for the additional openings after December 26, 2010 and refused to hire all ten discriminatees for any subsequent openings that developed after December 26, 2010.

Thus, when Respondent had openings in March of 2011, and possibly thereafter, it refused to consider for hire or to hire any of the discriminatees, which is unlawful, as noted. Since there were five positions available when Respondent started and at least one became open in March of 2011, a refusal to hire is established when that first opening became available. The precise date of that opening is uncertain from the record, so compliance will have to resolve that question. That raises the issue of which of the other discriminatees should be found to have been unlawfully refused hiring in March of 2011 for that fifth position. While I could leave that issue for compliance to decide, I find it appropriate to resolve it here since I conclude that I can make a reasonable decision based on the instant record. Thus, discriminatee Gao applied for a job on December 26 while the other five discriminatees all did not apply until December 29. I find that a reasonable basis to conclude that Gao would have received the fifth available position absent Respondent's unlawful discrimination and that it unlawfully refused to hire Gao as of sometime in March of 2011 when it hired its first replacement waitstaff employee.

Once compliance determines Zhang's status, a possible second refusal to hire violation could be found. This, if it is determined in compliance that Zhang was a waitstaff employee, then it would be found that Respondent had six waitstaff positions available on December 26 and thereafter. If so, then since the record establishes that Respondent filled a second waitstaff position in March of 2011, then an additional waitstaff unlawful refusal to hire would be established whenever compliance determines that the second opening occurred. If so, compliance will have the task of determining which of the remaining five discriminatees should be included as a refusal to hire discriminatee and to award backpay from the date of the replacement waitstaff hire in March of 2011 or thereafter.

As for any other waitstaff openings that compliance may uncover, a refusal to hire violation can only be found in my judgment if the number of openings exceeds six at the time. It would be inequitable to Respondent and a windfall to employees to require Respondent to instate or to pay backpay to more employees than available jobs at any particular time. Thus, unless the compliance investigation reveals waitstaff jobs in excess of six at any particular time, no additional refusals to hire should be found, even though there may have been more turnover.

Of course, if Zhang is found not to have been a waitstaff employee, the number of waitstaff employees would be five and no refusals to hire can be found absent more than five waitstaff positions when there were openings.

The remaining discriminatees will be entitled to the normal refusal to consider remedies.

Accordingly, in summary, I find that Respondent violated Section 8(a)(1) and (3) of the Act by refusing to consider for hire and refusing to hire Ivan, Rong, Jessica and Amy on December 26, 2010, by refusing to hire Gao sometime in March of 2011 and by refusing to consider to hire all ten discriminatees subsequent to sometime in March of 2011 when it first began hiring replacement waitstaff employees. Further, I have left to compliance to determine the possibility of additional refusal to hire violations, as well as which discriminatees should receive the refusal to consider remedies.

V. The Refusal to Recognize and Bargain with the Union

It is undisputed that on February 18, 2011, the Union demanded that Respondent recognize it as the representative of its employees and to negotiate a contract on behalf of its employees. They requested that Respondent hire the union workers, who had applied and noted that some of the applicants had previously worked at the restaurant when it was operated by Century Buffet. The union representative added that the restaurant is a union shop and that it is the same except for the change of the name.

It is well-settled that where a successor employer conducts essentially the same business at the same location as the prior employer at that location and that if a majority of a newly constituted bargaining employees would have been composed of former employees of the predecessor absent an unlawful refusal to hire, then the new employer is a statutory successor obligated to recognize and bargain with the union upon appropriate demand. *Mammoth Coal*, supra, 354 NLRB #83 slip op at 3; *W&M Properties of Connecticut*, 348 NLRB 162, 163 (2006); *Planned Building Services*, supra, 347 NLRB at 717, 718; *Love's Barbeque Restaurant*, 245 NLRB 78 (1979).

Here, the evidence is clear that Respondent operated the restaurant at the same location as Century Buffet, using the same equipment and operating the restaurant, in virtually the same way as a buffet-style Chinese restaurant. I have found that Respondent unlawfully refused to hire four former Century Buffet employees, constituting a majority of employees in an appropriate unit of Respondent's waitstaff employees.[25]

Accordingly, since it is undisputed that Respondent has refused to recognize or bargain with the Union, I conclude that it has violated Section 8(a)(1) and (5) of the Act by failing to do so. *Mammoth Coal*, supra; *W&M Properties*, supra; *Planned Building Services*, supra.

Conclusions of Law

1. The Respondent, Ocean Buffet, LLC, is an employer engaged in commerce within the meaning of 2(2), (6) and (7) of the Act.

2. 318 Restaurant Workers Union (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

3. The following employees of the Respondent constitute a unit appropriate for the purposes of collective bargaining within Section 9(b) of the Act.

All full-time and regular part-time waitstaff employees employed

[25] Respondent employed five or six employees as of December 26, depending upon the compliance investigation of Zhang's status.

by Respondent at its restaurant located at 166 Main Avenue, Clifton, New Jersey, excluding guards, professionals and supervisors as defined in the Act.

4. By refusing to consider for hire and refusing to hire employees, Rong Chen, Li Xian Jiang, Jin Ming Lin and Zha Xia Liu, on or about December 26, 2010 and thereafter, who previously had been employed at the locations set forth above because such employees had previously been represented by the Union and in order to avoid an obligation to recognize and bargain with the Union and because these employees engaged in protected concerted activities, Respondent violated Section 8(a)(1) and (3) of the Act.

5. By refusing to hire Yia Yun Gao and refusing to consider for hire Yia Yun Gao, Maoi Yang, Mei Fang He, Yu Jia Lin, Hui Lin and Jian Zhing Luo for jobs on or after March of 2011 because said employees engaged in activities in support of and/or were represented by the Union and because they engaged in protected concerted activities, Respondent has violated Section 8(a)(1) and (3) of the Act.

6. By refusing to recognize and bargain with the Union as the collective bargaining representative of its employees in the aforesaid appropriate unit, Respondent has violated Section 8(a)(1) and (5) of the Act.

7. The aforesaid unfair practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

Remedy

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. Having found that Respondent has discriminatorily refused to hire employees, Zha Xia Liu, Rong Chen, Li Xian Jiang, Jin Ming Lin and Yia Yun Gao, I shall recommend that Respondent be ordered to immediately offer to these employees employment at its restaurant as waitstaff employees without prejudice to their seniority and other rights and privileges previously enjoyed, discharging if necessary any employees hired to fill these positions. The employees shall be ordered to be made whole for any loss of earnings and other benefits that they have suffered due to the discrimination against them. Backpay shall be computed in accordance with *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center,* 356 NLRB No. 8 (2010), enf. denied on other grounds sub.nom., *Jackson Hospital Corp. v. NLRB*, 647 F.3d 1137 (D.C. Cir. 2011).

I have also concluded that Respondent violated Section 8(a)(1) and (3) of the Act by refusing to consider for hire, Maoi Yang, Mei Fang He, Yu Jia Lin, Hui Lin and Jian Zhing Luo, and that potentially it has violated the Act by refusing to hire one or more of these employees depending upon the results of the compliance proceedings.

I have also recommended in the analysis section of this decision that under the guidelines set forth in *U Ocean Palace Pavilion*, supra, 345 NLRB at 1162, 1174-1175, that the compliance stage of this proceeding determine whether or not Respondent refused to hire any of the five above described employees, and if so, to order backpay and employment for any of these employees. As I detailed above, these remedies will be ordered only if compliance determines the Respondent had in excess of five available waitstaff positions at any particular time and that among other issues will necessitate a resolution of Zhang's job status.

I further recommend a refusal to consider remedy for the remaining employees, who compliance determined were not unlawfully refused hire by Respondent.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[26]

ORDER

The Respondent, Ocean Buffet, LLC, Clifton, New Jersey, its officers, agents, successors and assigns, shall

1. Cease and desist from

(a) Refusing to hire or considering for hire employees or applicants for employment because of their union represented status at their predecessor employer (Century Buffet) because of their participation in a lawsuit against their predecessor employer, because of their activities on behalf of the Union, their engaging in protected concerted activities or in order to avoid having to recognize and bargain with the 318 Restaurant Workers Union (the Union).

(b) Refusing to recognize and bargain in good faith with the Union as the exclusive bargaining representative of its employees in the following appropriate unit.

> All full-time and regular part-time waitstaff employees employed by Respondent at its restaurant located at 166 Main Avenue, Clifton, New Jersey, excluding guards, professionals and supervisors as defined in the Act.

(c) In any like or related manner interfering with, restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Notify the Union in writing that it recognizes the Union as the exclusive representative of the bargaining unit employee under Section 9(a) of the Act and that it will bargain with the Union concerning terms and conditions of employment for the unit employees.

(b) Recognize and, on request, bargain with the Union as the exclusive representative of the unit employees concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

(c) Within 14 days from the date of the Board's Order, offer employment to positions as waitstaff employees the following named employees, Zha Xia Liu, Rong Chen, Li Xian Jiang, Jin Ming Lin and Yia Yun Gao without prejudice to their seniority or any other rights or privileges previously enjoyed, discharging if necessary any employees hired in their places.

[26] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(d) Make the employees referred to in the preceding paragraph whole for any loss of earnings and other benefits they may have suffered by reason of the Respondent's unlawful refusal to hire them, in the manner set forth in the remedy section of this decision.

(e) Offer employment to one or more of the following employees, if any, whose identity is to be determined in the compliance stage of this proceeding, to the positions to which they applied, without prejudice to their seniority or any other rights or privileges they would have enjoyed absent the discrimination against them and make them whole for any loss of earnings and other benefits sustained by reason of the discrimination against them, with interest, in the manner set forth in the remedy section of this decision.

Maoi Yang
Yu Jia Lin
Jian Zhing Luo
Mei Fang He
Hui Lin

(f) Consider the remaining discriminatees for any job openings since March of 2011, and any future openings that may arise, in accord with nondiscriminatory criteria, and notify them, the Charging Party, and the Regional Director for Region 22 of such openings in positions for which they applied or substantially equivalent positions. If it is shown at the compliance stage of this proceeding that, but for the failure to consider them, the Respondent would have selected any of these employees for any job openings arising since March of 2011, in excess of five or six waitstaff positions, depending upon the results of the compliance investigation, the Respondent shall hire them for any such opening and make them whole for any loss of earnings and other benefits sustained by reason of the discrimination against them, with interest, in the manner set forth in the remedy section of this decision.

(g) Within 14 days from the date of this Order, remove from its files any reference to the unlawful refusal to consider for hire or hire Zha Xia Liu, Rong Chen, Li Xian Jiang, Jin Ming Lin, Yia Yun Gao, Maoi Yang, Mei Fang He, Yu Jia Lin, Hui Lin, Jian Zhing Luo, and within 3 days thereafter, notify them in writing that this has been done and that these unlawful actions will not be used against them in any way.

(h) Preserve and, within 14 days of a request or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(i) Within 14 days after service by the Region, post at its facility in Clifton, New Jersey, copies of the attached notice marked "Appendix," [27] which shall be printed in Chinese and in English. Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the

[27] If this order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 26, 2010.

(j) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C., April 17, 2012.

_____
Steven Fish,
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT refuse to hire or consider for hire employees or applicants for employment because of their union represented status at their predecessor employer (Century Buffet), or because of their participation in a lawsuit against their predecessor employer or because of their activities on behalf of the Union or their engaging in protected concerted activities or in order to avoid having to recognize and bargain with the 318 Restaurant Workers Union (the Union).

WE WILL NOT refuse to recognize and bargain in good faith with the Union as the exclusive bargaining representative of our employees in the following appropriate unit.

All full-time and regular part-time waitstaff employees employed by Respondent at its restaurant located at 166 Main Avenue, Clifton, New Jersey, excluding guards, professionals and supervisors as defined in the Act.

WE WILL NOT in any like or related manner interfere with, restrain or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL notify the Union in writing that we recognize the Union as the exclusive representative of our bargaining unit employees under Section 9(a) of the Act and that we will bargain with the Union concerning terms and conditions of employment for the unit employees.

WE WILL recognize and, on request, bargain with the Union as the exclusive representative of the unit employees concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

WE WILL within 14 days from the date of the Board's Order, offer employment to positions as waitstaff employees the following named employees, Zha Xia Liu, Rong Chen, Li Xian Jiang, Jin Ming Lin and Yia Yun Grao without prejudice to their seniority or any other rights or privileges previously enjoyed, discharging if necessary any employees hired in their places.

WE WILL make the employees referred to in the preceding paragraph whole for any loss of earnings and other benefits they may have suffered by reason of our unlawful refusal to hire them, plus interest.

WE WILL offer employment to one or more of the following employees, if any, whose identity is to be determined in the compliance stage of this proceeding, to the positions to which they applied, without prejudice to their seniority or any other rights or privileges they would have enjoyed absent the discrimination against them and make them whole for any loss of earnings and other benefits sustained by reason of the discrimination against them, with interest.

Maoi Yang
Yu Jia Lin
Jian Zhing Luo
Mei Fang He
Hui Lin

WE WILL consider the remaining discriminatees for any job openings since March of 2011, and any future openings that may arise, in accord with nondiscriminatory criteria, and notify them, the Charging Party, and the Regional Director for Region 22 of such openings in positions for which they applied or substantially equivalent positions. If it is shown at the compliance stage of this proceeding that, but for the failure to consider them, we would have selected any of these employees for any job openings arising since March of 2011, in excess of five or six waitstaff positions, depending upon the results of the compliance investigation, we shall hire them for any such opening and make them whole for any loss of earnings and other benefits sustained by reason of the discrimination against them, with interest.

WE WILL within 14 days from the date of this Order, remove from our files any reference to the unlawful refusal to consider for hire or hire Zha Xia Liu, Rong Chen, Li Xian Jiang, Jin Ming Lin, Yia Yun Gao, Maoi Yang, Mei Fang He, Yu Jia Lin, Hui Lin, Jian Zhing Luo, and within 3 days thereafter, notify them in writing that this has been done and that these unlawful actions will not be used against them in any way.

OCEAN BUFFET, LLC

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

20 Washington Place, 5th Floor

Newark, New Jersey 07102-3110

Hours: 8:30 a.m. to 5 p.m.

973-645-2100.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 973-645-3784